Supreme Court, U.S.
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No. 91-91

In The

Supreme Court of the United States

October Term, 1991

EUERLE FARMS, INC., et al.,

Petitioners,

v.

FARM CREDIT SERVICES OF ST. PAUL, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, does not create a private cause of action in favor of member-borrowers of Farm Credit System institutions.

PARTIES

The petition for writ of certiorari contains a list of the parties. *See* Supreme Court Rule 24.2.

The respondents are institutional members of the Farm Credit System. They have no other parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Farm Credit Services of St. Paul, et al. (collectively "Farm Credit Services"), submit this brief in opposition to petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF JURISDICTION

The district court held that it lacked subject matter jurisdiction over the claims now advanced by petitioners. The jurisdiction of the court of appeals rested upon 28

U.S.C. § 1291. The judgment of the court of appeals was entered on March 18, 1991. Petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The legal issue in this case is one which several of the courts of appeals have examined and decided: whether farmer/borrowers from Farm Credit System institutions have a private right of action under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1987 Amendments to the Farm Credit Act of 1971, 12 U.S.C. § 2001, *et seq.*) ("1987 Act"), to seek relief for alleged violations of that statute. The appellate courts which have decided this issue have unanimously held that there is no such private right of action. In addition to the opinion and judgment of the United States Court of Appeals for the Eighth Circuit in this case, published at 928 F.2d 274, see also *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990) (en banc); *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 867, 107 L. Ed. 2d 951 (1990); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Perkins v. Farm Credit Bank of Wichita*, No. 90-1095, slip op. (10th Cir. Aug. 17, 1990) (per curiam), *cert. denied*, ___ U.S. ___, 111 S.Ct. 679, 112 L. Ed. 2d 671 (1991) (Farm Credit Services' Appendix at 1a). As can be seen, the Supreme Court has already twice denied petitions for writs of certiorari on this issue.

There is no split among the circuits on this jurisdictional issue. In *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit reversed a district court

decision dismissing on the merits a farmer/borrower's claim against a Farm Credit System institution under the 1987 Act. In *Payne*, neither the district court nor the Fourth Circuit addressed the threshold question of federal subject matter jurisdiction to entertain private claims under the 1987 Act. Therefore, *Payne* is not directly contrary to this case, *Zajac*, *Harper*, *Griffin*, and *Perkins*, all of which squarely addressed and decided the jurisdictional question. In the *Perkins* case, the issue of an alleged split among the circuits based upon *Payne* was aired, and this Court denied a petition for a writ of certiorari.

The Farm Credit System – For over 50 years the Farm Credit System, through its federally chartered cooperative institutions, has provided lending assistance to the nation's farmers, often when other private lenders could not or would not make such loans. During this time, the System has always operated on the principle of mutual ownership by its member/borrowers – the farmers whom the System serves. The Farm Credit System institutions in this case are all located in Minnesota or North Dakota and are part of the Seventh Farm Credit District, headquartered in St. Paul. The Seventh District serves member/borrowers in Minnesota, North Dakota, Wisconsin and Michigan.

The Action In The Lower Courts – On December 11, 1989, petitioners served their complaint upon Farm Credit Services of St. Paul. The 28 counts of the complaint contained a melange of state and federal allegations. The federal claims included claims under the Farm Credit Act, RICO, the Civil Rights Act, 42 U.S.C. §§ 1981-1983, and a never specified claim of usury. The state law claims

ranged from various lender liability theories, to allegedly tortious verbal abuse, and tortious fertilizer spreading.

The complaint is best characterized as a broad-based assault on the Farm Credit System by some 20 unrelated groups of member/borrowers in Minnesota and North Dakota. The defendants below were primarily Farm Credit lending institutions, employees, and ex-employees in Minnesota and North Dakota, although the petitioners also sued a commercial bank that participated in certain Farm Credit Services' loans, several individuals that the petitioners apparently misidentified as Farm Credit Services employees, as well as the Federal Farm Credit Banks Funding Corporation, a nationwide underwriting entity for the Farm Credit System. Before this Court, Petitioners only seek relief against the Farm Credit Services institutions which were defendants below.[1]

Farm Credit Services moved to dismiss the complaint in its entirety pursuant to Fed. R. Civ. P. 12(b).[2] *See* Appellants' Appendix to Court of Appeals at A-54 to A-57. Specifically, Farm Credit Services moved to dismiss

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[1] The Federal Farm Credit Banks Funding Corporation moved the district court separately for dismissal, a motion granted on July 27, 1990, District Court Docket Entry 90, and not appealed.

[2] Petitioners persistently mischaracterize the district court's dismissal as a grant of summary judgment in respondents' favor under Fed. R. Civ. P. 56. There are no legally relevant factual issues in this action. The district court dismissed the action on the complaint, pursuant to Fed. R. Civ. P. 12. The district court *did not* convert respondents' Rule 12 motion to one under Rule 56.

the federal claims premised upon the Agricultural Credit Act of 1987, and upon the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 ("1985 Act"), for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), on the ground that no private right of action exists under those statutes. Farm Credit Services also moved to dismiss the other federal law claims – those premised upon RICO, the Civil Rights Act, and an unspecified claim for usury – for failure to state a claim on which relief could be granted, Fed. R. Civ. P. 12(b)(6). Finally, Farm Credit Services moved to dismiss the pendent state claims on the ground that, if the district court dismissed the federal law claims, no independent basis for federal jurisdiction over the state claims existed.

In their papers filed in opposition to the motion to dismiss, the petitioners filed several affidavits and moved concurrently for a preliminary injunction, and the parties thereafter filed further affidavits in support of and in opposition to that motion. All of the affidavits were legally irrelevant to the motion to dismiss the 1987 Act, 1985 Act, and pendent state claims, and the district court properly ignored them in ruling upon Farm Credit Services' Rule 12(b)(1) motion.

The district court heard argument on Farm Credit Services' motion to dismiss and the petitioners' motion for preliminary injunction on February 23, 1990. The district court granted Farm Credit Services' motion to dismiss and simultaneously denied the petitioners' motion for preliminary injunction. Judgment was entered on

August 27, 1990, and was amended on September 11, 1990, to correct certain clerical errors.

Petitioners appealed from the decision of the district court, but only insofar as it dismissed claims under the 1987 Act, the 1985 Act, and the pendent state law claims. Petitioners dropped their claims under RICO, the Civil Rights Act, and their unspecified federal usury claim.

The appeal was decided by the Eighth Circuit on the briefs without oral argument. In their brief, the petitioners conceded that, "There is no very good argument that the provisions of the 1985 Farm Credit Act grant a private cause of action to the farmer [if] the 1987 Farm Credit Act does not. . . . " Petitioners' Brief to Court of Appeals at 18. On March 18, 1991, the court of appeals affirmed the judgment of the district court. The court's opinion focussed on the 1987 Act. In light of petitioners' concession and the court's determination that no private right of action existed under that Act, no separate discussion of the 1985 Act was required. Petitioners now seek a writ of certiorari from this Court, though they are apparently abandoning their pendent state law claims.

SUMMARY OF ARGUMENT

There is no need for this Court to hear this case. There is no split among the circuits on the issue presented. The federal appellate courts that have addressed the issue have all held that the 1987 Act contains no implied private right of action. The purported "conflict" with *Payne* cited by petitioners is illusory, as this Court recognized when it denied the petition for a writ of

certiorari in *Perkins*. Furthermore, the courts of appeals were correct in their analysis of the 1987 Act and their conclusion that it contains no implied private right of action.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

There is no conflict among the circuits on the issue presented in this case. The Eighth Circuit in this case and *Zajac*, the Ninth Circuit in *Harper*, and the Tenth Circuit in *Griffin* and *Perkins* have all decided that no private right of action exists under the 1987 Act.[3] These courts directly decided this threshold question of subject matter jurisdiction. *See, e.g., Harper*, 878 F.2d at 1173 ("The primary issue on appeal is whether there is an implied private right of action to enforce the Agricultural Credit Act of 1987 . . . ."); *Zajac*, 909 F.2d at 1183 ("We . . . join the Ninth and Tenth Circuits in holding there is no implied private right of action available to enforce the [1987] Act. . . . "). In *Payne*, the United States Court of Appeals for the Fourth Circuit elided any discussion of the existence of a private

[3] The courts of appeals have also held that there is no private right of action under the 1985 Act, *Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219 (8th Cir. 1988), *Mendel v. Prod. Credit Ass'n of the Midlands*, 862 F.2d 180 (8th Cir. 1988), or the underlying Farm Credit Act of 1971, *Bowling v. Block*, 785 F.2d 556 (6th Cir.), *cert. denied sub nom., Bower v. Lyng*, 479 U.S. 829 (1986), *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

right of action.[4] If and when the Fourth Circuit issues a judgment and opinion containing legal analysis which actually conflicts with that found in this case, *Harper*, *Zajac*, *Griffin*, and *Perkins*, this Court can review such a judgment at that time.

This Court has already recognized that *Payne* does not conflict with the decisions of the Eighth, Ninth, and Tenth Circuits. In deciding upon the petition for a writ of certiorari filed in *Perkins*, this Court faced in the briefs the same claims of conflict with *Payne*. *See, e.g.*, Brief of Respondents Farm Credit Bank of Wichita, et al., in Opposition to Petition for Writ of Certiorari at 5-7. This Court denied the petition for a writ of certiorari.[5]

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[4] The defendants Federal Land Bank of Columbia, et al., in *Payne* decided not to argue the private right of action issue before the Fourth Circuit:

> To begin with, the Land Bank will concede, for purposes of this appeal, that the [1987 Act] creates rights which are enforceable by "previous owners," such as Mr. Payne.

Brief of Federal Land Bank of Columbia to the United States Court of Appeals for the Fourth Circuit at 4-5.

[5] Petitioners claim in their Brief at 17-18 that the supposed conflict between *Payne* and the Eighth Circuit's decision in this case is more direct than any conflict between *Payne* and *Harper*, *Zajac*, or *Griffin*, because the petitioners here sought relief under the right of first refusal provisions of the 1987 Act, 12 U.S.C. § 2219a, as well as under the restructuring provisions directly at issue in *Harper*, *Zajac*, and *Griffin*, 12 U.S.C. §§ 2202-2202a. In the petition for a writ of certiorari in *Perkins*,

(Continued on following page)

II. THE CIRCUIT COURTS HAVE CORRECTLY DECIDED THE ISSUE PRESENTED

The decisions of the Courts of Appeals for the Eighth, Ninth, and Tenth Circuits in this case, *Zajac*, *Harper*, *Griffin*, and *Perkins* are well-reasoned and correct, requiring no review by this Court. As the Eighth Circuit in *Zajac* and the Ninth Circuit in *Harper* recognized, the issue of an implied private right of action is primarily an issue of congressional intent. *Zajac*, 909 F.2d at 1182; *Harper*, 878 F.2d at 1174 (both citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). The report of the Conference Committee on the 1987 Act, H.R. Conf. Rep. No. 490, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S. Code Cong. & Admin. News 2956 ("Conference Report"), deleted a private right of action provision present in the House Bill:

> The *House* bill will add a new provision to the Farm Credit Act of 1971 to give to borrowers the right to sue any [Farm Credit System] institution for violation of any duty, standard, or limitation prescribed under the Act and owing to the borrower, or of any [Farm Credit Administration] order issued with respect to such duty, standard, or limitation. A borrower will have

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(Continued from previous page)

this Court faced and rejected an identical claim of conflict based upon the right of first refusal provisions of the 1987 Act. In *Perkins* the plaintiffs sought relief under both the restructuring and right of first refusal provisions of the 1987 Act. The Tenth Circuit held that its decision in *Griffin* governed as well an action brought under the first refusal provisions of the 1987 Act, Farm Credit Services' Appendix at 2a, a decision this Court let stand.

> standing to sue if the borrower suffers a legal wrong or is adversely affected by the institution's violation. The U.S. district courts will have jurisdiction over suits under this provision, without regard to the amount in controversy.
>
> The *Senate* amendment contains no comparable provision.
>
> The *Conference* substitute deletes the *House* provision.

Conference Report Section 27, 1987 USCCAN at 2973 (emphasis in original). By deleting a provision which would have created a private right of action for any alleged violation of the Farm Credit Act, the Conference Committee made clear that no private right of action was intended to exist under the Farm Credit Act. Both the Eighth Circuit in *Zajac* and the Ninth Circuit in *Harper* cited this Conference Report to the 1987 Act as the authoritative statement of Congress' intent in passing the statute.[6]

There is nothing in the language used in Section 2219a detailing the rights of first refusal which is different in kind from the language used in the restructuring provisions of Sections 2202-2202a, or sufficient to warrant a private right of action analysis at variance with that found in *Harper, Zajac* and *Griffin*. The legislative history reviewed in those decisions all dealt with the private

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[6] The report of the Conference Committee is, next to the language of the statute itself, the most authoritative source for determining congressional intent. *See, e.g., Demby v. Schweiker,* 671 F.2d 507, 510 (D.C. Cir. 1981).

right of action issue in terms of the Act as a whole, not on a section-by-section basis.

The courts in *Harper* and *Zajac* properly identified the comprehensive administrative remedies granted to the federal Farm Credit Administration as the method chosen by Congress for enforcement of the 1987 Act. *Harper,* 878 F.2d at 1176; *Zajac,* 909 F.2d at 1183. The comprehensive Farm Credit Administration regulations interpreting the 1987 Act cover the right of first refusal provisions of Section 2219a. *See* 12 C.F.R. § 614.4522. The FCA's administrative enforcement powers are available to enforce compliance with Section 2219a as construed by that agency. Thus the conclusion that, "Congress intended administrative review to be the exclusive remedy for violations of the Act," *Zajac,* 909 F.2d at 1183, quoting *Harper,* 878 F.2d at 1176, is as applicable to claims under Section 2219a as to claims under Sections 2202-2202a.

In short, the appellate courts in this case, *Harper, Zajac, Griffin,* and *Perkins* all adhered to this Court's decisions and method of analysis in concluding that there is no implied private right of action in the Farm Credit Act. Further review by this Court is not necessary.

CONCLUSION

For all of the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated: July 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CALVIN J. PERKINS, Plaintiff-Appellant, v. THE FARM CREDIT BANK OF WICHITA formerly known as The Federal Land Bank of Wichita, a body corporate and federally chartered instrumentality of the United States organized pursuant to 12 U.S.C. Section 2011; KATHERINE A. WUNDERLICH; RODNEY C. CLASS-ERICKSON; CHERYL L. CLASS-ERICKSON, as assignees of the Farm Credit Bank of Wichita, Defendants-Appellees.	)	No. 90-1095 (D.C. No. 89-C-2034) (Dist. of Colorado)

ORDER AND JUDGMENT*

(Filed Aug. 17, 1990)

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before ANDERSON, BALDOCK, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Calvin Perkins brought this action against the defendants for damages and other relief stemming from the foreclosure and transfer of his agricultural property. Perkins' complaint alleged noncompliance by the defendants with the Agricultural Farm Credit Act of 1987 ("the 1987 Act") which prescribes a right of first refusal prior to any transfer of foreclosed property. 12 U.S.C. § 2219a. The district court granted the defendants' motion to dismiss and motion for summary judgment on the ground that no private right of action exists for violations of the 1987 Act. This appeal followed.

This court has joined the Ninth Circuit in holding that no implied private right of action exists under the 1987 Act. *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22, 24 (10th Cir. 1990); *accord Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 867 (1990). *But see Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989) (vacated pending rehearing en banc). We view our decision in *Griffin* as dispositive; we decline to adopt Perkins' suggested approach of treating each individual section of the Act differently. As

we noted in *Griffin*, the Ninth Circuit's decision in *Harper* adequately considered the relevant factors promulgated by the Supreme Court in determining that no implied private right of action exists. The reasoning of *Harper* is applicable to the entire Act. *See Harper*, 878 F.2d at 1174-77 (citing, *e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge